Omukhunya v Republic (Criminal Appeal 62 of 2020)
[2025] KECA 237 (KLR) (13 February 2025) (Judgment)

Neutral citation: [2025] KECA 237 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 62 OF 2020

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

FEBRUARY 13, 2025

BETWEEN

CHARLES OMUKHUNYA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kakamega (D.S. Majanja, J.) dated 26th September, 2019 delivered by (W. Musyoka) in HCCRA. No. 134 of 2018)

JUDGMENT

1. Charles Omukhunya, the appellant herein, was tried and convicted by the Senior Resident Magistrate court at Butere for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. He was sentenced to 15 years imprisonment. His appeal to the High Court against both conviction and sentence was dismissed.

2. He is now before this Court in an appeal which is against sentence only. The main ground of appeal is that the learned Judge of the High Court erred in failing to consider the time that he had spent in custody pending trial.

3. The applicant has filed written submissions in which he argues that under the provisions of section 333(2) of the *Criminal Procedure Code*, the period spent in custody during the trial is a factor to be considered when sentencing.

4. The respondent has filed written submissions in which they concede to the appeal, accepting that section 333(2) of the *Criminal Procedure Code* requires that the period spent in remand during the trial, be included in the computation of the sentence.

5. This appeal does not question the sentence imposed in any way, as such the sentence is lawful. However, the appellant laments that the period he was in custody was not considered. From the judgment of the

trial court, the record shows that the trial court sentenced the appellant to 15 years but did not state when the sentence was to start running. Section 333(2) of the *Criminal Procedure Code* provides as follows:

> " Subject to the provisions of section 38 of the *Penal Code* (cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

6. It is clear that the period during which an accused has been held in custody before being sentenced must be taken into account in meting out the sentence.

7. This Court in the case of *Ahamad Abolfathi Mohammed & Sayed Mansour Mousavi v. Republic* (Criminal Appeal 135 of 2016) [2018] KECA 743 (KLR) (Crim) (26 January 2018) (Judgment) stated that:

> " By dint of section 333(2) of the *Criminal Procedure Code*, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(s) of the *Criminal Procedure Code* was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012."

8. Similarly, in the case of *Bethwel Wilson Kibor v. Republic* [2009] eKLR the court stated that:

> " By proviso to section 333(2) of *Criminal Procedure Code*, where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. Ombija, J. who sentenced the appellant did not specifically state that he had taken into account the 9 years' period that the appellant had been in custody. The appellant told us that as at September 22, 2009, he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held."

9. In the *Judiciary Sentencing Policy Guidelines*, it provides:

> " The proviso to section 333(2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody if the convicted person had been in custody

during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial."

10. The appellant had been in custody from the date of his arraignment in court on 27th November, 2017. By dint of section 333(2) of the *Criminal Procedure Code*, the trial court was obliged to take into account the period that he had spent in custody before he was sentenced. When sentencing the appellant, the trial court stated as follows:

> " Accused sentenced to [15] years in prison. Right of appeal 14 days. Proceedings to be typed. SOA register forms to be e-filled and returned."

11. There is no evidence that the court took into account the period already spent by the appellant in custody. Taking into account the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody.

12. From the record, the appellant was first presented before the court for plea taking on 27th November 2017 and was, thereafter, convicted and sentenced on 3rd September 2018 to serve 15 years imprisonment. He is asking this Court to determine that the time of his sentence should start to run from 27th November 2017 when he was arraigned in Court.

13. Having recognized that the trial court did not take into account the period the appellant was held in custody; we find merit in this appeal to the extent that the sentence imposed of 15 years should run from the date the appellant was arraigned in court, being 27th November 2017.

DATED AND DELIVERED AT KISUMU THIS 13TH DAY OF FEBRUARY, 2025.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

signed

DEPUTY REGISTRAR